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7 **BEFORE THE**
8 **BOARD OF PHARMACY**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 2847

12 ANDREW SIMENTAL, III
13 7520 SLV Box
14 Victorville, CA 92392

**DEFAULT DECISION
AND ORDER**

and

[Gov. Code, §11520]

15 13150 Alta Visa
16 Victorville, CA 92392

Original Pharmacy Technician Registration
No. TCH 43778

Respondent.

18
19 FINDINGS OF FACT

20 1. On or about May 13, 2005, Complainant Patricia F. Harris, in her official
21 capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs,
22 filed Accusation No. 2847 against Andrew Simental, III (Respondent) before the Board of
23 Pharmacy (Board).

24 2. On or about August 12, 2002, the Board issued Original Pharmacy
25 Technician Registration No. TCH 43778 to Respondent. The Original Pharmacy Technician
26 Registration was in full force and effect at all times relevant to the charges brought herein and
27 will expire on August 31, 2006, unless renewed.

28 3. On or about May 20, 2005, Judith A. Barresen, an employee of the

1 Department of Justice, served by Certified and First Class Mail a copy of the Accusation No.
2 2847, Statement to Respondent, Notice of Defense, Request for Discovery, and Government
3 Code sections 11507.5, 11507.6, and 11507.7 to Respondent's address of record with the Board,
4 which was and is 7520 SVL Box, Victorville, CA 92392. The Accusation and related
5 documents were also served on Respondent at 13150 Alta Vista, Victorville, CA 92392. A copy
6 of the Accusation is attached as Exhibit A, and is incorporated herein by reference.

7 4. Service of the Accusation was effective as a matter of law under the
8 provisions of Government Code section 11505, subdivision (c).

9 5. On or about May 27, 2005, the aforementioned documents served at 13150
10 Alta Visa, Victorville, CA 92392, were returned by the U.S. Postal Service marked "Not
11 Deliverable as Addressed, Unable to Forward." A copy of the postal returned documents is
12 attached as Exhibit A, and is incorporated herein by reference. On or about June 2, 2005, the
13 domestic return receipt number 7001-0360-0003-2702-5110 served at 7520 SVL Box,
14 Victorville, CA 92392 containing the aforementioned documents was returned by the U.S. Postal
15 Service. A copy of the domestic return receipt is attached hereto as Exhibit C, and is
16 incorporated herein by reference.

17 6. Government Code section 11506 states, in pertinent part:

18 "(c) The respondent shall be entitled to a hearing on the merits if the respondent
19 files a notice of defense, and the notice shall be deemed a specific denial of all parts of the
20 accusation not expressly admitted. Failure to file a notice of defense shall constitute a waiver of
21 respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing."

22 7. Respondent failed to file a Notice of Defense within 15 days after service
23 upon him of the Accusation, and therefore waived his right to a hearing on the merits of
24 Accusation No. 2847.

25 8. California Government Code section 11520 states, in pertinent part:

26 "(a) If the respondent either fails to file a notice of defense or to appear at the
27 hearing, the agency may take action based upon the respondent's express admissions or
28 upon other evidence and affidavits may be used as evidence without any notice to

1 respondent."

2 9. Pursuant to its authority under Government Code section 11520, the Board
3 finds Respondent is in default. The Board will take action without further hearing and, based on
4 Respondent's express admissions by way of default and the evidence before it, contained in
5 Exhibit A finds that the allegations in Accusation No. 2847 are true.

6 10. The total costs for investigation and enforcement are \$1,452 as of July 8,
7 2005.

8 DETERMINATION OF ISSUES

9 1. Based on the foregoing findings of fact, Respondent Andrew Simental, III
10 has subjected his Original Pharmacy Technician Registration No. TCH 43778 to discipline.

11 2. A copy of the Accusation and the related documents and Declaration of
12 Service are attached.

13 3. The agency has jurisdiction to adjudicate this case by default.

14 4. The Board of Pharmacy is authorized to revoke Respondent's Original
15 Pharmacy Technician Registration based upon the following violations alleged in the Accusation:

16 a. Business and Professions Code sections 490 and 4301, subdivision
17 (l) - conviction of a substantially related crime.

18 b. Business and Professions Code section 4301, subdivision (h) -
19 administration and/or use of controlled substance and/or dangerous drug.

20 c. Business and Professions Code section 4301, subdivision (p) -
21 conduct which would warrant denial of license.

22 d. Business and Professions Code section 4301, subdivision (j) -
23 violation of statutes regulating controlled substances/dangerous drugs.

24 e. Business and Professions Code section 4301, subdivision (o) -
25 violation of provisions of the Pharmacy Law.

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Pursuant to Government Code section 11520, subdivision (c), Respondent may serve a written motion requesting that the Decision be vacated and stating the grounds relied on within seven (7) days after service of the Decision on Respondent. The agency in its discretion may vacate the Decision and grant a hearing on a showing of good cause, as defined in the statute.

It is so ORDERED August 17, 2005

By 
STANLEY W. GOLDENBERG
Board President

Attachments:

- Exhibit A: Accusation No.2847
Exhibit B: Postal return documents
Exhibit C: Domestic return receipt

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6 Attorneys for Complainant

7 **BEFORE THE**
8 **BOARD OF PHARMACY**
9 **DEPARTMENT OF CONSUMER AFFAIRS**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Accusation Against:

Case No. 2847

12 ANDREW SIMENTAL, III
7520 SVL Box
Victorville, CA 92392

A C C U S A T I O N

13 and

14 13150 Alta Vista
Victorville, CA 92392

15 Original Pharmacy Technician Registration
16 No. TCH 43778

17 Respondent.

18
19 Complainant alleges:

20 **PARTIES**

- 21 1. Patricia F. Harris (Complainant) brings this Accusation solely in her
22 official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer
23 Affairs (Board).
- 24 2. On or about August 12, 2002, the Board issued Original Pharmacy
25 Technician Registration No. TCH 43778 to Andrew Simental, III (Respondent). The Original
26 Pharmacy Technician Registration was in full force and effect at all times relevant to the charges
27 brought herein and will expire on August 31, 2006, unless renewed.
28

JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4300 of the Code provides, in pertinent part, that every license issued by the Board is subject to discipline, including suspension or revocation.

5. Section 4301 of the Code states:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

....

"(h) The administering to oneself, of any controlled substance, or the use of any dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a license under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license.

....

"(j) The violation of any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs.

....

"(l) The conviction of a crime substantially related to the qualifications, functions, and duties of a licensee under this chapter. The record of conviction of a violation of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or of a violation of the statutes of this state regulating controlled substances or dangerous drugs shall be conclusive evidence of unprofessional conduct. In all other cases, the record of conviction shall be conclusive evidence only of the fact that the conviction occurred. The board may inquire into the circumstances surrounding the commission of the crime, in order

1 to fix the degree of discipline or, in the case of a conviction not involving controlled substances
2 or dangerous drugs, to determine if the conviction is of an offense substantially related to the
3 qualifications, functions, and duties of a licensee under this chapter. A plea or verdict of guilty
4 or a conviction following a plea of nolo contendere is deemed to be a conviction within the
5 meaning of this provision. The board may take action when the time for appeal has elapsed, or
6 the judgment of conviction has been affirmed on appeal or when an order granting probation is
7 made suspending the imposition of sentence, irrespective of a subsequent order under Section
8 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a
9 plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information,
10 or indictment.

11 "(o) Violating or attempting to violate, directly or indirectly, or assisting in or
12 abetting the violation of or conspiring to violate any provision or term of this chapter or of the
13 applicable federal and state laws and regulations governing pharmacy, including regulations
14 established by the board.

15 "(p) Actions or conduct that would have warranted denial of a license."

16 6. Section 4060 of the Code states:

17 "No person shall possess any controlled substance, except that furnished to a
18 person upon the prescription of a physician, dentist, podiatrist, or veterinarian, or furnished
19 pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse
20 practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1. This
21 section shall not apply to the possession of any controlled substance by a manufacturer,
22 wholesaler, pharmacy, physician, podiatrist, dentist, veterinarian, certified nurse-midwife, nurse
23 practitioner, or physician assistant, when in stock in containers correctly labeled with the name
24 and address of the supplier or producer.

25 "Nothing in this section authorizes a certified nurse-midwife, a nurse practitioner,
26 or a physician assistant to order his or her own stock of dangerous drugs and devices."

27 7. California Code of Regulations, title 16, section 1770, states:

28 "For the purpose of denial, suspension, or revocation of a personal or facility

1 license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions
2 Code, a crime or act shall be considered substantially related to the qualifications, functions or
3 duties of a licensee or registrant if to a substantial degree it evidences present or potential
4 unfitness of a licensee or registrant to perform the functions authorized by his license or
5 registration in a manner consistent with the public health, safety, or welfare."

6 8. Section 490 of the Code states:

7 "A board may suspend or revoke a license on the ground that the licensee has been
8 convicted of a crime, if the crime is substantially related to the qualifications, functions,
9 or duties of the business or profession for which the license was issued. A conviction
10 within the meaning of this section means a plea or verdict of guilty or a conviction
11 following a plea of nolo contendere. Any action which a board is permitted to take
12 following the establishment of a conviction may be taken when the time for appeal has
13 elapsed, or the judgment of conviction has been affirmed on appeal, or when an order
14 granting probation is made suspending the imposition of sentence, irrespective of a
15 subsequent order under the provisions of Section 1203.4 of the Penal Code."

16 9. Section 118, subdivision (b), of the Code provides that the expiration of a
17 license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the
18 period within which the license may be renewed, restored, reissued or reinstated.

19 10. Section 125.3 of the Code provides, in pertinent part, that the Board may
20 request the administrative law judge to direct a licentiate found to have committed a violation or
21 violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation
22 and enforcement of the case.

23 11. CONTROLLED SUBSTANCES

24 A. "Marijuana" is a Schedule I controlled substance as defined in Health and
25 Safety Code section 11054 (d) (13). There is no legitimate indicated use for this drug.

26 B. "Methamphetamine" is a Schedule II controlled substances as defined in
27 Health and Safety Code section 11055(d)(2) and is categorized as a dangerous drug pursuant to
28 Business and Professions Code section 4022 of the Code.

1 FIRST CAUSE FOR DISCIPLINE

2 (Conviction of Substantially Related Crimes)

3 12. Respondent is subject to disciplinary action under sections 490, 4300 and
4 4301, subdivision (l) on the grounds of unprofessional conduct in conjunction with California
5 Code of Regulations, title 16, section 1770, in that Respondent was convicted of crimes
6 substantially related to the qualifications, functions, or duties of a pharmacy technician. The
7 circumstances are as follows:

8 a. On or about August 25, 2004, Respondent was convicted by the Court on a
9 plea of guilty to one count of violating Vehicle Code section 23152(a), a misdemeanor, (driving
10 while under the influence of an alcoholic beverage and/or a drug), one count of violating Health
11 and Safety Code section 11357(b), a misdemeanor, (possession of less than 1 oz. of marijuana),
12 and one count of violating Health and Safety Code section 11364, a misdemeanor (possession of
13 narcotic paraphernalia) in the Superior Court, County of San Bernardino, Victorville District,
14 Case No. TVI053801, entitled *The People of the State of California v. Andrew Simental III*.

15 b. The circumstances surrounding the convictions are that on or about June
16 24, 2004, when stopped by the California Highway Patrol for a traffic violation, Respondent
17 displayed objective symptoms of drug intoxication. Respondent admitted to the officer that he
18 smoked marijuana and methamphetamine earlier that day, and gave the officer two baggies of
19 marijuana upon request. After the officer conducted a search of Respondent and his vehicle,
20 Respondent was found to be in possession of methamphetamine and glass pipes.

21 SECOND CAUSE FOR DISCIPLINE

22 (Administer/Use of Controlled Substance/Dangerous Drug)

23 13. Respondent is subject to disciplinary action under sections 4300 and 4301,
24 subdivision (h) of the Code on the grounds of unprofessional conduct, in that Respondent used
25 marijuana and/or methamphetamine in a manner as to be dangerous to the public. The
26 circumstances are as more fully set forth in paragraph 12 above.

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1 3. Taking such other and further action as deemed necessary and proper.

2 DATED: 5/13/05

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PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant